



## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

**[RTID 0648-XC620]**

#### **Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to U.S. Navy Construction at Naval Station Newport, Rhode Island**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; proposed modification of a Letter of Authorization; request for comments.

**SUMMARY:** NMFS is proposing to modify the Letter of Authorization (LOA) that was issued to the United States Navy (Navy) on January 26, 2022 in association with construction activities related to bulkhead replacement and repairs at Naval Station Newport (NAVSTA Newport) over the course of five years (2022-2027). Necessary additions to the Navy's construction plan include vibratory driving of 30-inch (in) steel pipe piles and Down-The-Hole (DTH) driving when technically required for repairs to the S45 bulkhead facility. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is proposing to modify the Navy's LOA to increase authorized take by Level B harassment for harbor seal, gray seal, and harp seals. NMFS is also proposing to include appropriate, additional shutdown mitigation provisions for all species in the modified LOA. The monitoring and reporting measures remain the same as prescribed in the initial LOA. NMFS will also consider public comments on the requested modification prior to making any final decision and agency responses will be summarized in the final notice of our decision.

**DATES:** Comments and information must be received no later than [*INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER***].

**ADDRESSES:** Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Written comments should be submitted via email to *ITP.Hotchkin@noaa.gov*.

*Instructions:* NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period.

Comments, including all attachments, must not exceed a 25-megabyte file size.

Attachments to comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>* without change. All personal identifying information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Cara Hotchkin, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application and supporting documents (including NMFS ***Federal Register*** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at:

*<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>*. In case of problems accessing these documents, please call the contact listed above.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in shorthand as “mitigation”); and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

### **National Environmental Policy Act**

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our proposed action (*i.e.*, the issuance of an IHA) with respect to potential impacts on the human environment.

This action remains consistent with categories of activities identified in Categorical Exclusion B4 (incidental harassment authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order

216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion.

Accordingly, NMFS has preliminarily determined that the issuance of the proposed modified LOA continues to qualify to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the LOA Modification request.

### **History of Request**

On December 15, 2021, NMFS issued a final rule to the Navy (86 FR 71162) to incidentally harass, by Level A and Level B harassment only, marine mammals during construction activities associated with bulkhead replacement and repairs at Naval Station Newport (NAVSTA Newport) over the course of 5 years (2022-2027). Subsequently, on January 26, 2022, NMFS issued a Letter of Authorization (LOA) to the Navy (87 FR 6145) associated with the final rule. Species authorized for take included Atlantic white-sided dolphin (*Lagenorhynchus acutus*), common dolphin (*Delphinus delphis*), harbor porpoise (*Phocoena phocoena*), harbor seal (*Phoca vitulina*), gray seal (*Halichoerus grypus*), harp seal (*Pagophilus groenlandicus*), and hooded seal (*Cystophora cristata*). The effective dates of this LOA are May 15, 2022 through May 14, 2027.

On November 15, 2022, NMFS received a request from the Navy for a modification to the NAVSTA Newport bulkhead construction project due to a change in the construction contractor's plan. On December 15, 2022, the Navy revised their request to incorporate NMFS's DTH source level recommendations (available at:

[https://media.fisheries.noaa.gov/2022-](https://media.fisheries.noaa.gov/2022-11/PUBLIC%20DTH%20Basic%20Guidance_November%202022.pdf)

[11/PUBLIC%20DTH%20Basic%20Guidance\\_November%202022.pdf](https://media.fisheries.noaa.gov/2022-11/PUBLIC%20DTH%20Basic%20Guidance_November%202022.pdf)). In its initial

request for incidental take regulations, the Navy did not anticipate the need for vibratory driving of steel pipe piles or DTH installation of any pile type. Vibratory driving of steel sheet and H-piles was included, and analyzed in the rule. However, the construction contractor for the first phase of the project (S45 bulkhead) has since determined that vibratory driving of steel pipe piles will be required, and that DTH hammering may be necessary if obstructions are encountered that would prevent the use of impact or vibratory hammers to install piles. Therefore, the Navy is requesting, and NMFS is proposing, to modify the 2022 LOA to include take incidental to potential vibratory driving of 30-in steel pipe piles and DTH hammering of 10-in diameter holes. These updates to the Navy's specified activity would increase estimated Level B harassment isopleths and, therefore, result in an increased estimate of exposures by Level B harassment for harbor seal, gray seal, and harp seal. NMFS has determined that the changes also necessitate revised shutdown mitigation provisions for vibratory and DTH pile driving scenarios for all species. The monitoring and reporting measures remain the same as prescribed in the initial LOA, and no additional take is requested or proposed for other species.

### **Description of the Proposed Activity and Anticipated Impacts**

The modified LOA would include the same construction activities (*i.e.*, impact pile driving, vibratory pile driving and removal) in the same locations that were described in the 2022 final rule (86 FR 71162; December 15, 2021); for the S45 location, additional vibratory driving and DTH hammering are proposed. The monitoring and reporting measures remain the same as prescribed in the initial LOA, while revisions to the required mitigation measures have been proposed. NMFS refers the reader to relevant documents related to issuance of the initial LOA, including the Navy's application, the proposed rule and request for comments (86 FR 56857; October 13, 2021), final rule (86 FR 71162; December 15, 2021), and notice of issued LOA (87 FR 6145; February 3,

2022) (available at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-construction-naval-station-newport-rhode-island>) for more detailed description of the project activities.

#### *Detailed Description of the Action*

A detailed description of the construction activities is found in the aforementioned documents associated with issuance of the initial LOA. The location, time of year, and general nature of the activities are identical to those described in the previous documents. However, as noted in the **History of Request** section, the Navy anticipates that vibratory installation of 30-in steel pipe piles and DTH hammering will be necessary to complete the S45 phase of the project on time. Differences between the activities analyzed in the final rule and those analyzed in support of the proposed modification are shown in Table 1.

*Section S45:* In its current condition, this section of bulkhead is in serious condition with a high priority for replacement/repair because the steel sheet piles and cap exhibit heavy corrosion with numerous areas that exhibit 100 percent loss of section resulting in extensive landside erosion.

Under the proposed modification, replacement of Section S45 would include the demolition and replacement of approximately 310 ft of existing steel sheet pile bulkhead just south of Pier 1. The existing bulkhead would then be replaced with a new deadman anchored king pile system. The system would consist of approximately 4 (30-in) steel pipe piles; 160 (80 pairs) (22.5-in) Z-shaped sheet piles; and approximately 76 (14-in) H-piles. These piles would be installed approximately 1 ft in front of the existing bulkhead using a combination of vibratory and impact hammers, as necessary. In the modification request, the Navy has determined that the four 30-in steel pipe piles will be installed with a vibratory hammer, rather than the impact hammer considered in the final rule.

Additionally, the Navy has proposed the limited use of a DTH system on an as needed

basis, if obstructions are encountered that would prevent the use of just impact or vibratory hammers when installing piles at the S45 facility. The existing steel sheet pile wall would be excavated landside to a depth of approximately 10 ft below ground surface and cut off at the limit of excavation (see Figure 1-8 of the LOA application).

**Table 1 -- Bulkhead Pile Installation Activity at the S45 facility in initial LOA and the Proposed Modification**

Pile type	Final rule			Proposed LOA modification		
	Method	Number of piles	Number of days	Number of piles	Number of days	Number of piles
Steel sheet pile	Vibratory/impact	80 pair	27	Vibratory/impact	80 pair	27
Steel pipe pile	Impact	4	4	Vibratory	4	4
Steel H pile	Vibratory	76	13	Vibratory	76	13
DTH Holes	DTH	na	na	DTH	8	8

#### *Description of Marine Mammals*

A description of the marine mammals in the area of the activities is found in these previous documents, which remains applicable to this modified LOA as well. In addition, NMFS has reviewed the 2021 Stock Assessment Reports (Hayes *et al.*, 2022), information on relevant Unusual Mortality Events, and recent scientific literature, and determined that no new information affects our original analysis of impacts under the initial LOA. (Note that the Potential Biological Removal of the gray seal Western North Atlantic stock increased from 1,389 to 1,458, and annual mortality and serious injury of the harbor porpoise Gulf of Maine/Bay of Fundy stock decreased from 217 to 164).

#### *Potential Effects on Marine Mammals and their Habitat*

A description of the potential effects of the specified activities on marine mammals and their habitat may be found in the documents supporting the final rule, which remains applicable to modification of the LOA. NMFS is not aware of new information regarding potential effects.

#### *Estimated Take*

A detailed description of the methods and inputs used to estimate authorized take for the specified activity are found in the proposed rule (86 FR 56857; October 13, 2021); the descriptions presented in the proposed rule did not change in the final rule (86 FR 71162; December 15, 2021). The types and sizes of piles, and marine mammal stocks taken remain unchanged from the final rule. The proposed modification addresses the addition of vibratory driving of four 30-in steel pipe piles and ten instances of DTH hammering at the S45 bulkhead, which would result in increased harassment zone sizes. The Navy anticipates that up to four days of vibratory driving (up to two piles per day) and up to eight days of DTH hammering at one hole per day will be required. Acoustic effects on marine mammals during the specified activity can occur from impact and vibratory pile installation and removal, and DTH. The effects of underwater noise from the Navy's proposed activities have the potential to result in Level A and Level B harassment of marine mammals in the action area.

The proposed modification includes the use of DTH hammers, which were not evaluated in the final rule. A DTH hammer is essentially a drill bit that drills through the bedrock using a rotating function like a normal drill, in concert with a hammering mechanism operated by a pneumatic (or sometimes hydraulic) component integrated into the DTH hammer to increase speed of progress through the substrate (*i.e.*, it is similar to a "hammer drill" hand tool). The sounds produced by DTH methods contain both a continuous non-impulsive component from the drilling action and an impulsive component from the hammering effect. Therefore, NMFS treats DTH systems as both impulsive and continuous, non-impulsive sound source types simultaneously.

#### *Ensonified Area*

A detailed description of the operational and environmental parameters of the activity that are used in estimating the area ensonified above the acoustic thresholds, including source levels and transmission loss coefficient, can be found in the proposed



rule (86 FR 56857; October 13, 2021), and did not change in the final rule (86 FR 71162; December 15, 2021). The new proposed activities include vibratory driving of 30-in pipe piles and DTH hammering; for those activities, we provide a description of the sound source levels and ensonified areas below.

*Sound Source Levels of Proposed Activities* – The intensity of pile driving sounds is greatly influenced by factors such as the type of piles, hammers, and the physical environment (*e.g.*, sediment type) in which the activity takes place. The Navy consulted with NMFS on the appropriate sound source levels to use for vibratory driving, and NMFS recommended a value based on available measurements of vibratory driving of 30-in steel pipe piles (CALTRANS, 2020). Source data for the proposed installation methods and pile types are provided in Table 2. Note that the source levels in this Table represent the SPL referenced at a distance of 10 m from the source.

NMFS recommends treating DTH systems as both impulsive and continuous, non-impulsive sound source types simultaneously. Thus, impulsive thresholds are used to evaluate Level A harassment, and the continuous threshold is used to evaluate Level B harassment. The Navy consulted with NMFS to obtain the appropriate proxy values for DTH mono-hammers. NMFS recommended proxy levels for Level A harassment based on available data regarding DTH systems of similar sized piles and holes (Table 2) (Denes *et al.*, 2019; Guan and Miner, 2020; Reyff and Heyvaert, 2019; Reyff, 2020; Heyvaert and Reyff, 2021).

**Table 2 – Source information for modified pile driving and DTH activities**

	Average Peak SPL (dB re 1 $\mu$ Pa)	Average RMS SPL (dB re 1 $\mu$ Pa)	Average SEL (dB re 1 $\mu$ Pa <sup>2</sup> sec)	Strike rate (strikes per second)	Minutes to drive	Maximum number of piles per day
Vibratory Driving 30-in steel pipe piles	N/A	159	N/A	N/A	30	2
10-in DTH mono-hammer	172	167	146	10	240	1

The methods used to calculate the ensonified areas based on the sound source information in Table 2 are identical to those used in the final rule; details are provided in the Proposed Rule (86 FR 56857; October 13, 2021). The resulting Level A and Level B harassment isopleths are provided in Tables 3 and 4.

**Table 3 – Calculated Distance and Areas of Level A and Level B Harassment for Impulsive Noise (DTH)**

Activity	Duration, Count, Size, and or Rate	Total Production Days	Level A Harassment <sup>2</sup>			Level B Harassment
			Mid-Frequency Cetaceans (Dolphins)	High Frequency Cetaceans (Harbor Porpoise)	Phocid Pinnipeds	Harbor Porpoise and Phocids
DTH (10-in holes)	4 hours/day (1 hole/ day)	8	3.3 m / 0.000034 km <sup>2</sup>	111.6 m / 0.019204 km <sup>2</sup>	50.1 m / 0.004657 km <sup>2</sup>	See Table 4

**Table 4 – Calculated Distance and Areas of Level A and Level B Harassment for Non-Impulsive Noise (Vibratory, DTH)**

Activity	Duration, Count, Size, and or Rate	Total Production Days	Level A Harassment <sup>2</sup>			Level B Harassment
			Mid-Frequency Cetaceans (Dolphins)	High Frequency Cetaceans (Harbor Porpoise)	Phocid Pinnipeds	Harbor Porpoise and Phocids
DTH (10-in holes)	4 hours/day (1 hole/ day)	8	See Table 3			13,594 m / 7.80374 km <sup>2</sup>
30-in Steel Pipe Vibratory	1 hour/ day (2 piles/ day)	4	0.4 m / 0.000001 km <sup>2</sup>	7.4 m / 0.000152 km <sup>2</sup>	3.1 m / 0.00003 km <sup>2</sup>	3,981 m / 6.741652 km <sup>2</sup>

#### *Marine Mammal Occurrence and Take Calculation and Estimation*

A description of the methods used to estimate take anticipated to occur from the project is found in the project's aforementioned documents. The methods of estimating take are identical to those used in the final rule. Table 5 shows the authorized takes at the S45 facility under the initial LOA (all in year 1) and the estimated takes from the proposed modification.

**Table 5 -- Take Estimates at S45 Facility under the initial LOA and the Proposed Modification**

	Initial LOA (Year 1; S45)		Proposed Modification	
	Level A	Level B	Level A	Level B
Atlantic White-sided Dolphin	0	1	0	1
Common Dolphin	0	3	0	3
Harbor Porpoise	1	4	1	4
Harbor Seal	15	188	15	244
Gray Seal	3	40	3	52
Harp Seal	1	16	1	20
Hooded Seal	0	0	0	0

**Table 6 -- Take Estimates as a Percentage of Stock Abundance for the Proposed Modification for Year 1 takes at the S45 Facility**

Species	Stock (N <sub>EST</sub> )	Level A Harassment	Level B Harassment	Percent of Stock
Atlantic White-sided Dolphin	Western North Atlantic (93,233)	0	3	Less than 1 percent
Common Dolphin	Western North Atlantic (172,947)	0	3	Less than 1 percent
Harbor Porpoise	Gulf of Maine/Bay of Fundy (95,543)	1	4	Less than 1 percent
Harbor Seal	Western North Atlantic (61,336)	15	244	Less than 1 percent
Gray Seal	Western North Atlantic (451,431)	3	52	Less than 1 percent
Harp Seal	Western North Atlantic (7.6 million)	1	20	Less than 1 percent
Hooded Seal	Western North Atlantic (593,500)	0	0	Less than 1 percent

*Description of Proposed Mitigation, Monitoring and Reporting Measures*

The reporting measures proposed are identical to those included in the initial LOA and the discussion of the least practicable adverse impact included in 2022 final rule.

The monitoring and mitigation measures have been updated to include additional hydroacoustic monitoring and conservative shutdown zones. The following measures are proposed for inclusion in the LOA Modification, and are in addition to those described in

the Final Rule (86 FR 71162; December 15, 2021):

- Supplemental hydroacoustic monitoring will include:
  - 30-in Steel Pipe – vibratory driving: 2 piles; and
  - Obstruction drilling – DTH hammer: up to 8 holes (if required for pile installation).
- Shutdown zones for the new activities identical to those identified in the Final Rule (86 FR 71162; December 15, 2021):
  - DTH Obstruction Drilling: The maximum shutdown zone included in the initial LOA is 150 m. This distance is greater than the calculated distance to Level A harassment thresholds for marine mammal species from DTH activities at the S45 facility, which is 111.6 m for harbor porpoise. The Navy proposes to implement the same 150 m shutdown distance for cetaceans and pinnipeds when conducting DTH activities.
  - Vibratory driving steel pipe piles: the greatest calculated distance to Level A harassment thresholds for species at this location is 7.4 m, which is less than the standard construction shutdown of 10 m to prevent equipment/mammal interactions. However, for consistency the Navy has proposed a 30 m shutdown distance for cetaceans and 10 m for pinnipeds from vibratory pile driving steel pipe piles, which is the same as for vibratory driving steel sheet piles in the issued authorization.

### **Preliminary Determinations**

With the exception of the revised take numbers and monitoring and mitigation measures, the Navy's in water construction activities as well as reporting requirements are unchanged from those in the initial LOA. The effects of the activity on the affected species and stocks, taking into consideration the modified mitigation and related

monitoring measures, remain unchanged, notwithstanding the increase to the authorized amount of harbor seal, gray seal, and harp seal take by Level B harassment.

The additional takes from Level B harassment would be due to potential behavioral disturbance and TTS. No serious injury or mortality is anticipated given the nature of the activity and measures designed to minimize the possibility of injury to marine mammals. The potential for harassment is minimized through the construction method and the implementation of the planned mitigation measures (see **Description of Mitigation, Monitoring and Reporting Measures** section).

The Navy's proposed pile driving project precludes the likelihood of serious injury or mortality. For all species and stocks, take would occur within a limited, confined area (immediately surrounding NAVSTA Newport in the Narragansett Bay area) of the stock's range. Level A and Level B harassment will be reduced to the level of least practicable adverse impact through use of mitigation measures described herein. Furthermore, the amount of take proposed to be authorized is extremely small when compared to stock abundance.

The additional 72 takes of harbor, gray, and harp seals represents an increase of approximately 5.7 percent of the total take authorized in the initial LOA, and the anticipated impacts are identical to those described in the 2022 final rule. The amount of additional take for each species is also small (less than 1 percent of each stock). The Navy has proposed additional hydro-acoustic monitoring of the new activities, which will improve understanding of the source levels of such activities for future work. The proposed modification to the LOA includes additional required mitigation and monitoring measures (albeit some minor modification to harassment and shutdown distances), and identical reporting measures as the 2022 LOA.

In conclusion, there is no new information suggesting that our analysis or findings should change.

Based on the information contained here and in the referenced documents, NMFS has preliminarily determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the proposed authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the proposed authorized takes represent small numbers of marine mammals relative to the affected stock abundances; and (4) Navy's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and (5) appropriate monitoring and reporting requirements are included..

### **Endangered Species Act (ESA)**

Section 7(a)(2) of the ESA (16 U.S.C. 1531 *et seq.*) requires that each Federal agency ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of incidental take authorizations, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

### **Proposed Authorization**

As a result of these preliminary determinations, NMFS proposes to issue an LOA modification to the United States Navy for conducting construction activities for bulkhead replacement and repairs at the S45 Facility at Naval Station Newport (NAVSTA Newport), Rhode Island, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed

modified LOA can be found at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>.

### **Request for Public Comments**

We request comment on our analyses on the proposed modification and supporting analyses described in this notice of Proposed LOA Modification for the proposed construction activities for bulkhead replacement and repairs at the S45 Facility. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

**Dated:** December 28, 2022.

**Daniel Bess,**

*Acting Director, Office of Protected Resources,*

*National Marine Fisheries Service.*

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